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**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable:** YES/NO

**Of Interest to other Judges:** YES/NO

**Circulate to Magistrates:** YES/NO

Appeal number: A150/2023

In the matter between:

**M[...] T[...] P[...]**

Appellant

(LINK: 4[...])

and

**ROAD ACCIDENT FUND**

Respondent

**CORAM:** MHLAMBI, ADJP, VAN ZYL, J *et* DANISO, J

**JUDGMENT BY:** VAN ZYL, J

**HEARD ON:** 26 APRIL 2024

**DELIVERED ON:** 26 SEPTEMBER 2024

**MAJORITY JUDGMENT**

[1] The mother and natural guardian of the appellant instituted a claim against the respondent for damages sustained by the appellant allegedly as a result of an incident arising from the negligent driving of a motor vehicle by an insured driver. At the time of the institution of the claim the appellant was a minor. The appellant has since attained majority and the appeal was, therefore, noted in her name.

[2] The appeal is directed against the order of the court *a quo* in terms whereof the aforesaid claim was dismissed, with costs. Leave to appeal was granted by the court *a quo*.

[3] In paragraphs 4 and 5 of the amended particulars of claim, the following averments are made:

“4. On or about the 07<sup>th</sup> day of May 2017, and at, near or along Nthunya street, Ikgomotseng in Soutpan, Free State Province, the plaintiff’s minor T[...] P[...] M[...] was a passenger of a motor vehicle bearing registration letters and numbers CKM [...] (“the insured vehicle”), there and then been driven by a certain LIBELE LUKU KOTOYI (“the insured driver”) when she fell out of moving vehicle.

5. The aforesaid collision was caused by the exclusive negligence driving of the driver of the Insured vehicle who was negligent in one, more or all of the following respects: –

5.1 he failed to keep a proper lookout;

5.2 he failed to keep the insured vehicle under the proper control;

5.3 he failed to avoid collision when by the exercise of a reasonable care and skill, a reasonable man could and should have done so;

5.4 he failed to pay due regard to the safety of his passengers more particularly that of the plaintiff’s minor;

5.5 he drove the insured vehicle at an excessive speed under the prevailing circumstances; and

5.6 he failed to apply his brakes timeously or at all.”

- [4] In the amended plea the respondent denied any knowledge of the incident. The respondent further pleaded that should it be found that the incident occurred as alleged by the appellant, it is denied that the insured driver was negligent. In the alternative it was pleaded that should it be found that the insured driver was negligent, the respondent denies that such negligence was the cause of the incident.
- [5] The merits and quantum were separated and the court *a quo* consequently only heard the issue in respect of liability.

### **The evidence:**

- [6] The appellant testified in support of her own case and her friend, T[...] S[...] (“Ms S[...]”) was also called as a witness; in fact, the evidence of Ms S[...] was presented before that of the appellant. The insured driver, Mr Kotoyi, testified on behalf of the respondent. Since this appeal is to be decided mainly upon factual issues, I deem it necessary to deal in some detail with certain aspects of the versions of the respective witnesses and, in some instances, to quote extensively from the record of the proceedings in the court *a quo*.

### **Ms S[...]:**

#### **Evidence in chief:**

- [7] Ms S[...] testified that she is the appellant’s friend. At the time when she testified, she was 18 years of age, but at the time of the incident she was 13 years old. She confirmed that three gentlemen arrived at her parental home in a Nissan 1400 bakkie and they found her uncle drinking. They joined in and also drank alcohol, after which they stood up saying that they are going to sell the chickens. Ms S[...], the appellant and some other children requested them that they be allowed to help them selling the chickens, to which the three gentlemen agreed. They therefore accompanied the three gentleman into the township to sell the chickens. After they sold some of the chickens and some

of the chickens were still left on the back of the bakkie, they drove to a tavern. Ms S[...] and the other children remained at the bakkie, whilst the three gentlemen entered the tavern. After some time, they exited the tavern with quarts of beer in their hands and got into the bakkie. They drove back to Ms S[...]’s parental home to greet the people. When the gentlemen were about to leave, they requested them if they could get a lift to the shop, to which the gentlemen agreed. Ms S[...] described the subsequent events as follows:

“MS S[...]: We were in that vehicle and then it drove past the shop where we requested them to stop, as we realized that they had passed the shop I knocked on the window, we made them aware to stop so that we can alight from the vehicle. They did not stop because the vehicle was in a high speed, a commotion took place there, there was a commotion there and someone pushed T[...]. On realizing that T[...] had fallen I also deliberately threw myself to the ground.”

- [8] After T[...] fell to the ground and Ms S[...] also jumped off the vehicle, the bakkie kept on driving. The other children subsequently told them that they too jumped from the moving bakkie. When asked how many people were in the bakkie, excluding the children, Ms S[...] testified that it was the driver, a passenger and the third man was with them on the back of the bakkie.

#### Cross-examination:

- [9] Ms S[...] testified that of the three gentlemen she knew two of them, since they frequently visited her parental home to visit and to drink. It was the first time that she saw the third man. According to Ms S[...] the driver was one of the two gentlemen she knew and he was called “Oupa”. She further testified that when they asked permission to accompany the three gentlemen to sell chickens in the township, she spoke to Oupa. After he agreed thereto, they (the children) climbed onto the back of the bakkie. Ms S[...] was referred to her witness statement in which it was stated that the driver was Mr Kotoyi. According to Ms S[...] she only signed the statement, but that the lawyer drafted the statement. She testified that she never mentioned the name Kotoyi and that she knew the

driver as Oupa. The following evidence then emanated from further cross-examination:

“MS BANDA: Okay, then who is this person that is written on the statement?

MS S[...]: I do not know.

MS BANDA: So this person that you wrote on the statement was not the one driving the vehicle?

MS S[...]: I do not know his full name, I cannot say it is him or not, I do not know his full name, I only know him by the name Oupa.”

[10] When asked whether the bakkie had a canopy, she testified that it did not have a canopy. There were two people seated in the front when they went to sell the chickens and about seven people on the back of the bakkie.

[11] According to Ms S[...] the three gentlemen spent about an hour inside the tavern before they came out with quarts of beer. During that time the children remained seated on the back of the bakkie, “*watching the chickens*”. They then drove back to her parental home.

[12] Back at her parental home, after they sold chickens in the township and after the three gentlemen visited the tavern, the three men greeted her family as they were about to leave and they accompanied the gentlemen. They climbed onto the back of the bakkie and the gentlemen left with them. Ms S[...] further testified as follows:

“MS S[...]: Yes, we were going to the shop, and we asked them to drop us at the shop on their way out.

MS BANDA: Okay, again who was driving the vehicle, was Oupa still driving the vehicle?

MS S[...]: Yes.

MS BANDA: So Oupa was still driving the vehicle?

MS S[...]: Yes.

MS BANDA: And Oupa knew that you were seated at the back of the vehicle with the other kids?

MS S[...]: Yes, he knew.”

[13] Later in her cross-examination, Ms S[...] explained that when they arrived back home at her parental home after they returned from the tavern, she, the appellant and two children who were related to her, as well as the three gentlemen, got off and out of the bakkie. Some of the children were left on the bakkie. The three gentlemen told her family that they were leaving and Ms S[...] asked them whether they can climb on the bakkie so that the three men can drop them at the shop. Oupa then gave his permission that they can get onto the bakkie, which they did. The following evidence is then reflected:

“MS BANDA: And Oupa is the one who is driving?

MS S[...]: I do not know whether it was Oupa or somebody else.MS MS BANDA: So is the driver now changing?

MS S[...]: I do not think it is changing.

MS BANDA: Okay, but then who is driving?

MS S[...]: I do not recall, but the one who had been driving was Oupa.

MS BANDA: Okay, you said that you do not recall but the person who was driving was Oupa?

MS S[...]: He is the one who came driving the car.

MS BANDA: Okay, so when you got onto the car you told Oupa to drop you off at the tuck shop?

MS S[...]: I told Oupa that.

MS BANDA: Okay, so you told Oupa and Oupa was the driver?

MS S[...]: Yes, I was telling him because he was the only one with whom I could speak, I do not know the other people's name.

MS BANDA: Who was driving, that was my question?

MS S[...]: I am not sure that Oupa was driving ma'am.

MS BANDA: Okay, so you told Oupa to drop you off at the shop as he was driving the car?

MS S[...]: He was as yet inside the car, he was not yet inside the car when I told him that.

MS BANDA: Okay, but when they go into the car who was driving?

MS S[...]: It was Oupa.

MS BANDA: Okay, so Oupa was driving the car when you got on and you ask him to drop you off at the shop?

MS S[...]: Yes.”

[14] She again explained how the driver drove past the shop where he was supposed to drop them off. The children were knocking on the rear window of the bakkie in an attempt to stop the driver, but to no avail. At that stage there was a commotion on the back of the bakkie and the appellant was pushed off the vehicle in the process.

[15] Ms S[...] again explained that the vehicle was speeding and that they were trying to stop the driver. She testified that the bakkie was over crowded because the bakkie is small. The vehicle was packed at the back, as there were many of them, when the appellant was pushed. Because there were so many of them on the back of the bakkie, she does not know who pushed the appellant.

[16] She was asked what distance the bakkie drove from the point where the appellant was pushed from the bakkie until the point where Ms S[...] jumped off the bakkie, whereupon she pointed out a distance from where she was seated up to where the restrooms were. When the court asked her to compare the distance to the size of a netball field, as Ms S[...] played netball, she estimated the distance to have been approximately 100 metres. She was also asked how she could tell that the vehicle was moving at a high speed, where to she responded that she “*can see*” when a vehicle is at a high speed. She estimated the speed of the bakkie to have been 180 kilometres per hour. When she jumped off the bakkie, she was only slightly injured, but it was only abrasions.

[17] When asked whether Ms S[...] could see through the rear window inside the bakkie, she confirmed same. The following questions and answers then followed:

“MS BANDA: And as you were banging on the window what were they doing?

MS S[...]: They did not do anything. They just looked forward.

MS BANDA: So they did not turn back, no one turned back?

MS BANDA: No one turned their heads to look back?

MS S[...]: No one.

MS BANDA: Okay, so at that time how many people were then seated in the front of the bakkie?

MS S[...]: They were two, the third one was seated with us at the back.

MS BANDA: And that third person who was he?

MS S[...]: That is the person that I do not know.

MS BANDA: T[...]2 I put it to you that the insured driver was Mr Lebele Luke Kotoyi, that was the person who was driving the car at the time.

MS S[...]: I hear you.

MS BANDA: Okay, that is the person's name you put in the statement?

MS S[...]: No, I never put that name on the statement, I never put it on the statement.

...

MS BANDA: Okay, so then where did you get that name from because it is in your statement?

MS S[...]: I never made mention of this name.

MS BANDA: Okay, did you tell the attorney when you were making the statement who the driver was?

MS S[...]: No.

MS BANDA: So you did not tell your attorney that Oupa was driving the car?

MS S[...]: Yes, I told them that it was Oupa who was driving.

MS BANDA: And then this name here on your statement is Kotoyi?

MS S[...]: I do not know that name.

MS BANDA: I put it to you that at the time of the alleged accident Oupa is not the person who was driving the car.

MS S[...]: I can hear you.

MS BANDA: Okay, I also put it to you that my insured driver will come to this court and testify that at no point did you or any other children get into the back of the bakkie.

MS S[...]: We were on that bakkie.

MS BANDA: You not tell him that you were getting onto the bakkie, so he did not know that you were there.

MS S[...]: I told Oupa because he was the driver.

COURT: Just a minute Ms Banda. What are you putting to her now, you say your insured driver will say at no point did she or any other children get onto the back of the bakkie, are you trying to say with his consent?

MS BANDA: Yes.

COURT: Or do you say not at all?

MS BANDA: Or not at all, with his consent and not at all.

COURT: Not at all?

MS BANDA: Yes, that will be his testimony."

[18] In response to questions posed by the court to Ms S[...], she testified that she does not know who pushed the appellant. She explained that she did not see what actually made the appellant fall off the bakkie, she later heard from the other children and from the appellant herself that someone pushed the appellant off the bakkie.

### **The appellant:**

#### Evidence in chief:

[19] The appellant was 18 years old when she presented her evidence. She was only 12 years of age at the time of the incident. On 7 May 2017 three gentlemen who were selling chickens arrived at Ms S[...]'s parental home with a 1400 bakkie. All three gentlemen consumed alcohol with Ms S[...]'s uncle.

They were drinking Black Label. After that they said that they were going to sell chickens, whereupon the appellant, Ms S[...] and one Nkosi requested permission from them to accompany them to help them sell the chickens. According to the appellant they were at least seven children, but not more than ten. After they sold some of the chickens, the three gentlemen drove to a tavern and parked there. They entered the tavern and told the children to watch over the chickens. They were in the tavern for a while, where after they came out with three quarts of beer. They drove back to Ms S[...]’s parental home. When they greeted Ms S[...]’s family as they were leaving, the appellant and Ms S[...] requested permission to accompany them and to be dropped off at the shop. They agreed and Ms S[...] and the appellant climbed onto the bakkie. On a question posed to her, the appellant specifically testified that they were outside the bakkie when they enquired whether they could ride along.

[20] The bakkie drove off at a high speed. They drove past the shop, whereupon the appellant and her friends attempted to signal the driver to stop. This they did by knocking on the window, but to no avail. They also tried to wake the one gentleman (of the three gentlemen) who was with them on the back of the bakkie, but he was struggling to wake up. The other two gentlemen were seated in the front of the bakkie. There developed a commotion on the back of the bakkie and somebody pushed the appellant, whereupon she fell off the bakkie. She does not know who pushed her. She was injured and hospitalized. At the end of her evidence in chief, the appellant presented the following evidence:

“MS M[...]: Yes, I was seated on the place under which there is a wheel, a car wheel, but I stood up to try and wake that male person up.

MS BALOYI: You said you stood up and that is when you fell?

MS M[...]: That is how I was pushed and fell.”

#### Cross-examination:

[21] During cross-examination the appellant testified that when they asked permission to accompany the gentleman to help them sell chickens, they spoke

to the gentlemen who was on crutches. The appellant could not say who was driving when they went to sell the chickens and that she was unable describe him. Later in her cross-examination she testified that it was the first time she saw the three gentlemen, that they were unknown to her.

[22] Whilst they were selling chickens, two of the gentlemen were seated in the front and one was seated with them on the back of the bakkie. When the three men entered the tavern they requested the children to look after the remaining chickens on the bakkie. After the three men exited the tavern, two of them again got into the front of the bakkie and the other one onto the back.

[23] In further cross-examination she testified that after they requested permission to drive along to the shop, they were between seven and ten children who climbed onto the bakkie. She was asked where she was seated and the following evidence transpired:

|                    |                                                  |
|--------------------|--------------------------------------------------|
| <u>“MS M[...]:</u> | On this place whereunder there is a wheel.       |
| <u>MS BANDA:</u>   | So inside the bakkie?                            |
| <u>MS M[...]:</u>  | On that very same thing.                         |
| <u>MS BANDA:</u>   | Okay, so it was never at the edge of the bakkie? |
| <u>MS M[...]:</u>  | No.”                                             |

[24] The appellant further explained that all seven to ten of them were seated inside the goods compartment of the bakkie, pressed against each other.

[25] The appellant again testified that the bakkie drove past the shop at a high speed. They knocked on the window in an attempt to alert the driver to stop, but without success. They also tried to wake the gentlemen up who was asleep on the back of the bakkie. She explained as follows:

|                    |                                                                                               |
|--------------------|-----------------------------------------------------------------------------------------------|
| <u>“MS M[...]:</u> | By the time I stood up to try and wake this person up somebody then in the process pushed me. |
| <u>MS BANDA:</u>   | Did somebody push you from the vehicle and you testified you do not know who?                 |

MS M[...]: Yes.”

[26] She was confronted with the fact that the accident report states that she jumped off a moving vehicle, whereupon the appellant testified that she did not jump off while the vehicle was in motion, she was pushed.

[27] The appellant further testified that the bakkie was driven at a speed, but that she is unable to estimate the speed of a car. The following evidence followed:

“MS BANDA: Okay, but what made you notice, or see that this car is driving at a speed, what was happening?

MS M[...]: If a vehicle is at a speed and we are congested in the back of the bakkie, it was also windy as the car was driving. You are panicking because the car is now in a high speed.

MS BANDA: And did you alert the driver maybe that you are going too fast?

MS M[...]: We knocked continuously on the window as he had long passed the shop.

....

MS BANDA: Okay, but did you not think it was dangerous to stand up when this vehicle was in motion?

MS M[...]: That never crossed my mind because I was frightened, what I wanted to do was to wake this man up so that we can climb off that vehicle, that speeding vehicle.

MS BANDA: Okay, can you repeat that?

MS M[...]: I do not think that it was dangerous because I was also frightened, what I wanted to do was to wake this man up so that he stops the people in the front there or the driver.

MS BANDA: Okay, so this man did not wake up?

MS M[...]: No. He never woke up.

MS BANDA: And then what happened?

MS M[...]: Then somebody pushed me, in the process somebody pushed me, and I fell.”

[28] It was put to the appellant that the insured driver will testify that there was no one on the back of the bakkie. The appellant again confirmed that they were on the back of the bakkie when he was driving it. It was further put to her that no one informed him that there were people on the back of the bakkie. The appellant responded that she told the man with the crutches who was seated in front with him in the bakkie.

[29] It was also put to the appellant that according to the insured driver he was not drinking on that day, but the appellant again confirmed that she saw him drinking Black Label at Ms S[...]’s parental home. She further testified that although she did not enter the tavern, all three of the gentlemen were, according to her, drinking in the tavern since they remained there for quite a long time.

**Mr Kotoyi:**

Evidence in chief:

[30] Mr Kotoyi testified that on 7 May 2017 he was the driver of a small Nissan bakkie with registration number CKM [...]. He transported two gentlemen from Bainsvlei, Bloemfontein, to Soutpan, which gentlemen were selling chickens. On their arrival at Soutpan they drove around selling chickens. The two gentlemen knew people at Soutpan. After selling the chickens, they went to a certain house where they met with another male person whom the other two gentlemen knew. They sat conversing and one of the two gentlemen who was with Mr Kotoyi, went out of the house to go and buy two quarts of beer. According to Mr Kotoyi he did not consume alcohol on that day, he drank water. After the beer was finished, one of the two gentlemen exited the house saying that he was going to sell some of those chickens “*to somebody else outside there*”. He drove with the bakkie. He took inordinately long and they sent some children to go and look for him. The children saw him at a tavern and told him that the other two gentlemen wanted to leave. When he returned, they sat and conversed for about twenty to twenty-five minutes, after which they greeted as they wanted to leave. When he was outside, he conversed with someone and

after about five minutes his passengers also got into the bakkie and they left. According to Mr Kotoyi he was the driver. They drove through the township in the vicinity of the shops and the tavern, where after they drove up to the T-junction where the Soutpan road connected to the main road between Bloemfontein and Bultfontein. After they arrived at Bloemfontein, they stopped at a filling station and someone called one of his passengers and informed him that they "*let a child fall*".

[31] During his further evidence he testified that the streets in the area of Soutpan were full of potholes and he drove at an average speed of between 60 and 65 kilometres per hour, trying to avoid the potholes. When asked what was on the back of the bakkie, Mr Kotoyi testified that there were live chickens and a spare wheel. When asked whether the bakkie had a canopy, Mr Kotoyi testified that it did not have a canopy.

[32] When he was advised that Ms S[...] testified that they asked the driver, Oupa, whether they will drop them off at the shop and he agreed to it. Mr Kotoyi testified that he was not told anything to that effect and that he was the driver of the bakkie. He is not known as Oupa.

Cross-examination:

[33] Mr Kotoyi testified that his eldest sister was the owner of the bakkie and that she sent him to take the two gentlemen to Soutpan on that particular day. Mr Kotoyi repeated his evidence that they drove around selling chickens, where after they went to the home of the people whom the two gentlemen knew. One of the gentlemen who was with him, was indeed on crutches.

[34] Mr Kotoyi testified that when they were about to leave, they exited the gate and the two gentlemen conversed outside the vehicle with the male person from the house. Mr Kotoyi did not see any other people. It was only the two gentlemen who got into the bakkie. The following evidence was then recorded:

“MS BALOYI: I am not sure if my question, I will repeat my question, would you see if there were people who entered the vehicle, would you be aware that there were people at the back of the bakkie?

MR KOTOYI: Yes, there were no people, I would see.

MS BALOYI: You said it was dark, correct?

MR KOTOYI: When I made mention of darkness it is illuminated in the township.

MS BALOYI: It is what?

MR KOTOYI: Illuminated the lights.

MR KOTOYI: There are lights in the township... When you go outside there are electric lights there, although it is dark where you go outside... When you exit the township it is only then that you will see that it is dark, because you are now leaving the lights behind.”

[35] Mr Kotoyi further testified that when he exited the gate, he was on the pavement next to the gate, whilst the other two gentlemen were busy exiting the gate. The two gentlemen then went around to the back of the bakkie. The bakkie was shaking a bit, as the two gentlemen were leaning against the bakkie.

[36] When he was asked how they were seated in the bakkie, Mr Kotoyi testified that the two gentlemen sat next to him in the front of the bakkie.

[37] I deem it necessary to also quote the following extracts from the record:

“MS BALOYI: Earlier you said because you were selling chicken, I want to know were there still chicken left in the bakkie or not?

MR KOTOYI: There were a few of them left, we were turning back to Bainsvlei.

...

MR KOTOYI: There were no cages at all there, there was grass that was spread on the deck of the bakkie, they were loose.

MS BALOYI: When you were selling chickens during the day how were you seated, were you still three in the bakkie, or was there anyone sitting at the back?

MR KOTOYI: Two in the front, one at the back.

MS BOLOYI: And who was driving?

MR KOTOYI: I was driving.

MS BALOYI: During the day when you were selling chickens were there any children at the back of the bakkie?

MR KOTOYI: I was not aware whether there were children or not, but what was obscuring my sight was the canvas, I could not see because of that canvass, I could not see on the rear view mirror, because of the canvas.

COURT: Where was the canvas, was it drawn over the bakkie, or where was it while you were selling the chickens?

MR KOTOYI: We thrust it inside there and tightened it M'Lord and then we fastened it on those [intervenes].

COURT: Clips on the bakkie?

MR KOTOYI: Clips, yes.

COURT: But what I want to know is when you did that while you were selling the chickens, was the *seil* drawn over the back of the bakkie or was the back of the bakkie therefore open?

MR KOTOYI: We opened it that much M'Lord.

COURT: You show about half a metre?

...

MR KOTOYI: That was the space for that other gentleman to put his feet in there and sit on that part where was a stand.

...

MS BALOYI: So, you were driving with the chickens the whole day covered by that canvas?

MR KOTOYI: Yes.

MS BALOYI: I just want to understand, now the gentleman who was sitting did he go under, or did he cover, how did he sit, was he sitting at the back, was he sitting next, just behind the driver or where the passenger sit, where was that person sitting?

MR KOTOYI: There is a wheel, I could see he was sitting on the sides of the bakkie, I could not see.

MS BALOYI: So, meaning your visibility was obscured?

MR KOTOYI: I could only see on the sides, there in the back I could not.

MS BALOYI: Now, sir I put it to you sir that on the day the children were seated on the back of the bakkie.

MR KOTOYI: Well, I do not know where they climb from.

COURT: No, the question is were the children there or not, Ms Baloyi put it to you, in other words, she says there were children at the back.

MR KOTOYI: I hear you are telling me that, but I did not see them.

MS BALOYI: It was evidence of the two witnesses before court that one of the gentlemen whose name is Oupa gave them permission to be in that bakkie to sell chicken with them.

...

MR KOTOYI: I hear you said that Oupa said that they must sell the chickens with them which is what I do not know.

MS BALOYI: So, you do not know if Oupa gave them permission or not?

MR KOTOYI: I do not know even if they were there or not.

...

MS BALOYI: When they left the place where the two gentlemen were behind him now... just clarify when the two gentlemen entered the motor vehicle could you see at the back of the bakkie?

MR KOTOYI: As I indicated to court I could only see on the sides, now that which was directly behind the bakkie I would not see.

COURT: At the time you dropped out of the township, that is what Ms Baloyi wants to know?

MR KOTOYI: When we were driving away, yes, I could see on the sides when we drove out.

COURT: Where was the canvas at that stage?

MR KOTOYI: The canvas was at the back of the bakkie, because it was meant to [intervenes].

...

MR KOTOYI: When he arrived with this bakkie as they were wanted... As we were seeking this person... He had drawn the cover so that the chickens must not get out.

COURT: When you say drawn the canvas what do you mean by that?

MR KOTOYI: He had closed the canvas so that the chickens must not go out, as I already indicated to court that they were going around with the bakkie leaning against it, they were conversing until they got in.

...

MS BALOYI: And you could not see if there people at the back of the bakkie or not?

MR KOTOYI: Yes, I would not see if they were coming directly behind the bakkie but on the sides I could see, the sides of the bakkie I could see.

MS BALOYI: Mr Kotoyi, I put it to you that the two witnesses testified before court that they asked one of the gentlemen Oupa for a lift to drop at a nearby store, and Oupa gave them permission.

...

MR KOTOYI: I already told the court that Oupa did not tell me anything.

...

MS BALOYI: Now, as you are driving could you see through your mirror, could you observe at the back through your mirror, could you see clearly on the moonlight?

MR KOTOYI: As we were exiting as we were getting away you could see on the sides of the bakkie, but not directly at the back of the bakkie."

#### Re-examination:

[38] During re-examination the following evidence was extracted:

“MS BANDA: As the *seil* was covering the chickens, when you were driving could you see what is happening in the rear view mirror?

MR KOTOYI: As I indicated to the Court, I could only see by virtue of the side of the side mirrors.

COURT: Does the car have a rear mirror in the car?

MR KOTOYI: Yes there is a rear view mirror, it has a rear view mirror.

COURT: And that is the question, could you see at the back by looking at the rear view mirror?

MR KOTOYI: I could not see by virtue of rear view mirror M'Lord, because the canvas was fastened to the sides of the bakkie and I could not see because it was obscuring the mirror, the rear view mirror.

MS BANDA: So, this canvas was it something high, higher than the size of the bakkie?

MR KOTOYI: It is level with the top of the bakkie.

MS BANDA: With the top, top of the bakkie or with the roof of the bakkie?

MR KOTOYI: The roof of the bakkie.

MS BANDA: It was level with the roof of the bakkie?

MR KOTOYI: That is correct.

MS BANDA: So you could not see anything whatsoever?

MR KOTOYI: The inside of the bakkie was not visible to me, I could only see the sides of the bakkie.

MS BANDA: Yes, I can understand you could only see the sides, but does that mean that canvas was just as tall as the roof of the bakkie, from your rear view mirror inside the window of your bakkie you could not see anything?

MR KOTOYI: Yes, it was indeed like that.”

[39] Ms Banda enquired from Mr Kotoyi whether the canvas covered the rear of the bakkie. The following evidence followed:

“MR KOTOYI: When we went out it was covered.

MS BANDA: So, no one could come in and sit there?

MR KOTOYI: There would not be anyone unless someone opens for them to sit there in the back.

MS BANDA: And according to your knowledge no one opened that *seil* when you were leaving, according to you?

MR KOTOYI: I was not the person who opened the *seil*.

MS BANDA: No one says someone opened the *seil*. I am saying according to you there was no one that could open the *seil* and get in because it was covered, there was no space for anyone else?

MR KOTOYI: Yes, I agree.”

### **Findings by the court a quo:**

[40] The court *a quo* made, *inter alia*, the following findings:

“[16] I am faced with two irreconcilable versions. The manner in which such factual disputes are generally resolved has been set out in **Stellenbosch Farmers’ Winery v Matell**.

...

[17] The plaintiff tendered three different versions on how the incident happened. First, the particulars of claim state that T[...] fell out of the moving bakkie. Second, T[...] and T[...]2 testified that the former was pushed off the bakkie. In the accident report it is stated that she jumped off the bakkie.

[18] There no sensible reason why the insured driver would have refused to stop for them to alight. It is highly improbable that all the other children would have jumped off the moving bakkie without any of them sustaining serious injuries. On the insured driver’s version there were live chickens in the goods compartment it would not make sense to keep the chickens in an uncovered compartment. It is obvious that some if not all of them would have flown out of the compartment, as they were not in a chicken coop.

[19] The danger of suggestions having been made to the children is also a reality in this matter. T[...]2 denied mentioning the insured driver's name to the person who took her statement. Both of them testified that they were between seven and ten children on the bakkie. T[...]2 initially testified as if she had seen who pushed T[...], in cross-examination she testified that she subsequently heard that she was pushed. Strangely, she does not know or enquired as to who pushed T[...]. Although it is difficult to estimate the speed at which a car is travelling, it is clear that T[...]2 was exaggerating.

[20] The insured driver's version is simple and straightforward. There was no one in the compartment that he was aware of. His version is not improbable.

[21] In my view, it is probable that T[...] alone or with T[...]2 clandestinely got onto the bakkie and T[...] fell off the moving bakkie. That explains why the insured driver was not aware of her or them and while they could not give a coherent account of how T[...] sustained her injuries. Regard being had to the probabilities and the fact that the plaintiff bears the onus, I cannot find on a balance of probabilities that T[...]’s injuries are due to the insured driver’s negligence or other wrongful act.”

### **Notice of appeal:**

[41] In the notice of appeal the grounds of appeal are set out to be the following:

“3.1 the finding that the child or children on the back of the LDV (prior to the injury-causing event) had hidden in the load bay, is erroneous;

- 3.2 the finding that the driver of the LDV were unaware of their presence, is erroneous;
- 3.3 a credibility finding against the insured driver should have been made (on account of his contradictory version as to the sequence of events and his involvement on that day);
- 3.4 a finding should have been made that the version testified to by the appellant and her witness was more probable and established the appellant's case on a balance of probabilities;
- 3.5 the approaching of the matter as a matter that had mutually destructive versions, was erroneous (all the evidence in the general scheme of things should have been evaluated with application of the principles espoused in **National Employers General Insurance Company Ltd v Jagers** 1984 (4) SA 437 (E), and **Selamolela & Makhado** 1988 (2) SA 372 (V)).”

### **General legal principles:**

[42] The court *a quo* had to determine whether the appellant discharged her onus to prove her case on a balance of probabilities.

[43] The court *a quo* correctly stated that the case consists of two irreconcilable versions; hence, mutually destructive versions in the sense that the acceptance of the one must necessarily lead to the rejection of the other. In **National Employers` General Insurance Co Ltd** 1984 (4) SA 437 (E) at 440 D – 441 A, the following applicable principles are stated:

“It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present

case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by COETZEE J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens (supra)* and *African Eagle Assurance Co Ltd v Cainer (supra)*. I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the *onus* which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[44] The consequences of a failure to cross-examine are set out, with reference to relevant authority, in **LAW OF EVIDENCE**, CHW Schmidt *et* H Rademeyer, May 2024 – SI 22, Page 9-72 at paragraph 9.2.4.2.6:

Failure to cross-examine a witness about an aspect of his evidence may have the result that the evidence may not be called into question later. The cross-examiner who intends to dispute what the witness says has a duty to give him an opportunity to explain his evidence or to qualify it, or to properly reveal its basis to the court. Failure to do so has been dubbed extremely unfair and improper. Apart from the injustice to the witness, failure to cross-examine may indicate acceptance, comparable with an admission by silence. From this point of view such evidence will carry more weight than evidence disputed by means of cross-examination, so that failure to cross-examine will then be seen as a factor increasing evidential value. A cross-examiner is also duty-bound to clearly put his defence on each and every aspect which he or she wishes to place in issue, to the witness implicating his client.

**The merits of the appeal:**

**Evaluation of the evidence:**

[45] Like I have indicated earlier in this judgment, the outcome of the appeal is to be determined upon a proper consideration and evaluation of the factual evidence presented in this matter.

[46] The crux of the defendant's defence, namely that there was nobody on the back of the bakkie; alternatively, that Mr Kotoyi was unaware of the presence of anybody on the back of the bakkie, was never put to Ms S[...]. That was for the first time put to the appellant.

[47] The version of Ms S[...] and the appellant differ substantially from that of Mr Kotoyi in respect of the selling of the chickens. Despite this, their version was never denied in cross-examination. Mr Kotoyi's version was also never put to either Ms S[...] or the appellant. According to Ms S[...] and the appellant, all

three the gentlemen went from Ms S[...]’s family home into the township to sell chickens, the children asked permission from the one gentlemen to join them to help with the selling of the chickens and they (seven to ten children) accompanied the men by riding on the back of the bakkie. From selling the chickens on their way back to the home of S[...]’s family, they stopped at a tavern, told the children to watch the chickens which had not been sold and which were still on the back of the bakkie and then went into the tavern, where they spent quite some time and, according to the appellant, came out with three quarts of beer. According to Mr Kotoyi only one of the three gentlemen went from the family home of Ms S[...] to the township to sell chickens, where that gentleman, on his own, visited the tavern. Mr Kotoyi and the second gentlemen on the crutches remained at the family home of Ms S[...]. Some children were sent to call that gentlemen back to the house when they wanted to return to Bloemfontein and they found him at the tavern. By clear implication it is the respondent’s version that no children accompanied the gentleman who went to sell chickens in the township.

[48] The respondent abided in the general proposition that Mr Kotoyi had no alcohol to drink on the day of the incident. Despite this, nowhere in the cross-examination of Ms S[...] was her detailed account of Mr Kotoyi also drinking at her family home, put in dispute. It was only belatedly put to the appellant when she testified that Mr Kotoyi drank Black Label beer at the family home of Ms S[...]. The version of Ms S[...] and the appellant that Mr Kotoyi also attended the tavern and that all three gentlemen remained there for quite a long time and exited with three quarts of beer, was also never disputed. It was only during Mr Kotoyi’s own evidence that he testified that he remained at the family home of Ms S[...] and never went to the tavern.

[49] Ms S[...] testified during her cross-examination that when they went to sell the chickens, there were two people seated in the front of the bakkie and about seven people on the back of the bakkie. By implication this means that one of the three gentlemen must also have been seated on the back of the bakkie. The appellant pertinently testified that whilst they were selling the chickens, two of the gentlemen were seated in front and one was seated with them on the

back of the bakkie. Mr Kotoyi, during his cross-examination, also testified that one of the three gentlemen was sitting on the back of the bakkie when they were selling chickens (on his version that the three of them went selling chickens in the township before they went to the family home of Ms S[...]). The question that begs an answer is how Ms S[...] and the appellant would have known that one of the men sat on the back of the bakkie during the selling of the chickens if they had not accompanied the three men on the excursion as described by Ms S[...] and the appellant. Therein lies a guarantee of the truth of their version.

[50] I find a further guarantee in the truth of their version in a small piece of detailed evidence to which both Ms S[...] and the plaintiff testified. They both testified that when the three men parked at the tavern they requested Ms S[...] and the appellant to look after the remaining chickens. The presence of such an otherwise insignificant piece of evidence in the evidence of both Ms S[...] and the appellant, is, in my view, not to be expected had their version been a concocted story which they made up.

[51] The thrust of the respondent's version eventually turned out to revolve around the canvas which was allegedly over the load bay of the bakkie. In this regard I need to raise the following unsatisfactory and questionable aspects of this evidence:

1. The alleged presence of the canvas and that it obscured the view of Mr Kotoyi, were never put to Ms S[...] nor the appellant. Mr Kotoyi did also not testify about it in his evidence in chief. It was for the first time raised in the cross-examination of Mr Kotoyi.
2. As already pointed out earlier, the version of Ms S[...] and the appellant that they and other children accompanied the three gentlemen to help them to sell the chickens, was never denied in cross-examination. It was also never put to them that they would not have been able to climb onto the bakkie and would not have fitted on the bakkie due to the alleged existence of the canvas. It was also not put to them that Mr Kotoyi would

not have known about their presence on the back of the bakkie because of the presence of the canvas.

3. Moreover, it was only in the re-examination of Mr Kotoyi that the version that the canvas was allegedly the same height as the roof of the bakkie, came to light. It is, in my view, evident from the record that the legal representative on behalf of the respondent at the time, was also surprised by this evidence and raised further questions in an attempt to get clarity.
4. On the one hand it is the version of Mr Kotoyi that the canvas was the same height as the roof of the bakkie, but on the other hand he responded to questions posed by the court *a quo* to him that the canvas was fastened to the clips in the bakkie. Such clips, according to his evidence in re-examination, were on the sides of the bakkie, which would have resulted in the canvas only being the height of the load bay of the bakkie, which contradicts the version of Mr Kotoyi.
5. Ms S[...] was pertinently asked during cross-examination whether the bakkie had a canopy, to which she responded in the negative. Had the legal representative on behalf of the respondent at that stage already knew about the version of Mr Kotoyi in respect of the canvass, one would have expected that it would have been put to Ms S[...], since, according to the description of Mr Kotoyi, the canvas was similar to having a canopy on the bakkie. Mr Kotoyi similarly responded in the negative during his evidence in chief when pertinently asked whether the bakkie had a canopy. Once again, one would have expected that he would have responded with a reference to the presence of the canvas, but still no such evidence was forthcoming in his evidence in chief.
6. It was the appellant's version that she was pushed off the bakkie when she stood up from where she was seated in order to wake the gentleman who was asleep on the back of the bakkie. If a canvas was coring the load bay of the bakkie at the height of the roof of the bakkie, the appellant would not have been able to stand up, as the "roof" of the canvas would

have been too low for her to do so. However, her version in this regard was never specifically challenged.

7. If the canvas was as high as the roof of the bakkie, fastened to the clips of the bakkie and “drawn” closed at the back of the bakkie so that the chickens could not get out, as explained by Mr Kotoyi, the appellant would not have fallen off the bakkie, since the canvas would have prevented her fall.
  
8. Mr Kotoyi testified in his evidence in chief that although the bakkie had a rear view mirror, the canvas obscured his view with his rear view mirror and he could not see what was directly behind the bakkie, he could only see the sides of the bakkie by means of his side mirrors. During the re-examination of Mr Kotoyi he specifically testified that “*the inside of the bakkie was not visible to me*”, which I understand to mean that Mr Kotoyi could not see in the load bay of the bakkie. However, during the cross-examination of Ms S[...] testified, in response to a question from the legal representative of the respondent, that she could see through the rear window inside the bakkie and she described how she saw that the two gentlemen in the bakkie did not look backwards as a result of the children knocking on the rear window of the bakkie, they just looked forward. This evidence of Ms S[...] was never challenged or denied. If the unchallenged evidence of Ms S[...] is to be accepted, there could not have been anything that prevented Mr Kotoyi to have been able to see in the load bay of the bakkie by means of his rear view mirror.
  
9. Both Ms S[...] and the appellant testified how the bakkie drove past the shop at a high speed. They were never questioned on this part of their evidence. Ms S[...] also testified that she could “see” that the bakkie was driving at a high speed. The appellant testified in cross-examination that it was windy on the back of the bakkie since the bakkie was driving at a high speed. In my view the aforesaid observations by the two witnesses would not have been possible if the load bay of the bakkie was enclosed by a canvass as described by Mr Kotoyi. Their evidence that the bakkie was

speeding was never denied in cross-examination. In fact, according to Mr Kotoyi's own version he was driving above the speed limit.

The court a quo's evaluation of the evidence:

[52] The court *a quo* made much of the differences between having fallen out of the moving bakkie, having been pushed off the bakkie or having jumped off the bakkie. The version of both Ms S[...] is that the appellant was pushed off the bakkie, which caused her to fall off the bakkie, which are similar concepts. One has to be mindful of the fact that the appellant's two witnesses testified that they were cramped in on the bakkie, pressing against one another and that a commotion developed when the bakkie did not stop at the shop. Therefore, in my view, "pushed off" "fell off" could also mean that she was bumped or nudged off by one or more of the other children in the process of the commotion. It is neither here nor there – it does not negatively reflect on the credibility of Ms S[...] and the appellant. With regard to the version contained in the accident report, there is no evidence as to who provided that version. In this regard Ms S[...] testified that after the appellant fell, she *was not the normal T[...] I knew*" and an ambulance was summoned. It can therefore not merely be accepted that the appellant was the author of that version. In any event, the exact mechanism of the event need not be established. The fact of the matter is that, on the appellant's version, it was connected to the negligence of Mr Kotoyi. See **Minister of Safety and Security** 2009 (4) SA 213 (E).

[53] When the court *a quo*'s determination of the credibility of the respective witnesses and the probabilities, is, with respect, patently wrong. The court *a quo* failed to properly and fully evaluate the totality of the evidence. It merely referred to extracts from the evidence and based its findings thereon. With regard to the evidence of Mr Kotoyi, the court *a quo* did not even deal with his version, but made an unsubstantiated finding that his version was "*straightforward*" and "*not improbable*". In the circumstances we, as a court of appeal, are at liberty to depart from the court *a quo*'s findings of fact and credibility. See **S v Leve** 2011 (1) SACR 87 (ECG) at para [8].

[54] The court *a quo*, in my view, correctly found, contrary to the initial version of Mr Kotoyi, that the appellant was on the back of the bakkie and fell from the moving bakkie. However, in view of the totality of the evidence, the court *a quo* erred in finding that the appellant “*alone or with*” Ms S[...] “*clandestinely got onto the bakkie*”.

Conclusion regarding the evaluation of the evidence:

[55] In my view the appellant and Ms S[...] gave a full and detailed factual account of their version of events on the day of the incident. Their respective versions corresponded in all material respects. They did not contradict themselves, nor did they contradict each other. Considering my evaluation of the evidence set out above, their version, in my view, also corresponds with the probabilities.

[56] The respondent’s case started off with Mr Kotoyi’s version as being one of denial of the fact that the children were on the bakkie. It developed into a version that he does not know whether they were on the bakkie or not and if they were, he was not informed accordingly and he was unaware that they were there.

[57] The court *a quo* found, in my view correctly so, that the appellant was on the back of the bakkie and that she fell off the moving bakkie. However, on the totality of the evidence the court *a quo* should have found that Ms S[...] and the other children were also on the back of the bakkie, considering the explanations how they were all squeezed in on the small bakkie and the commotion which developed. The court *a quo* stated at paragraph [14] of its judgment that Ms S[...] did not make mention that one of the three gentlemen was also on the back of the bakkie with them, sleeping, as testified by the appellant. This is with respect, not correct. Ms S[...] specifically testified during cross-examination that one of the three gentlemen was seated on the back of the bakkie with them. This detail, in my view, gives a guarantee of truth to Ms S[...]’s version that she was also on the back of the bakkie.

[58] In my view the first crack in the version and credibility of Mr Kotoyi, was the failure to have denied the version of Ms S[...] and the appellant regarding their excursion to go and help sell chickens in the township, the fact that the permission of one of the three gentlemen was asked and granted to accompany them, the fact all three gentlemen went with and that they stopped at a tavern on their return before they went back to the family home of Ms S[...] and probably consumed alcohol there. Even if it was not the driver's permission which was asked, on the version of Ms S[...] and the appellant they had permission to go along and therefore, according to me, they had no reason to have hidden themselves on the bakkie. This excursion happened in broad daylight and happened in circumstances where the children were even asked to look after the chickens at the tavern. Therefore, on probabilities, Mr Kotoyi would have been aware of their presence on the bakkie.

[59] The second crack in the version and credibility of Mr Kotoyi was the failure to have raised the alleged presence of the canvas right from the outset when Ms S[...] and the appellant testified. As previously indicated, it was not even raised during the evidence in chief of Mr Kotoyi. Considering the totality of the evidence and the probabilities, and my evaluation thereof, I cannot accept Mr Kotoyi's evidence in this regard. Although I accept that there probably was some form of canvas which was used to cover or to be thrown over the chickens, I cannot accept the version of Mr Kotoyi regarding the nature and extent thereof. In response to questions by the court *a quo* at the beginning of the evidence regarding the canvas, the following questions was elicited:

"COURT: Where was the canvas, was it drawn over the bakkie, or where was it while you were selling the chickens?

MR KOTOYI: We thrust it inside there and tightened it M'Lord and then we fastened it on those clips [intervenes]

COURT: Clips on the bakkie?

MR KOTOYI: Clips, yes." (My emphasis)

he aforesaid evidence gives the impression that the canvas was rather pushed inside the load bay than pulled over it like Mr Kotoyi later on described. That

also corresponds with the evidence of Ms S[...], which was never challenged, that she was able to see through the rear window into the front of the bakkie where two of the three gentlemen were seated.

[60] The third crack in the version and credibility of Mr Kotoyi, was the failure to have challenged and denied the version of Ms S[...] and the appellant has to how they asked permission to drive along to the shop, albeit such permission may not have been asked from the driver as such. The fact is that they did ask permission and therefore had no reason to have hidden themselves or to have clandestinely climbed onto the bakkie. In fact, the evidence of Ms S[...] and the appellant was that although some of the children remained on the bakkie after the chicken selling excursion, Ms S[...], the appellant and some of the children got off the bakkie were standing away from the bakkie when they asked for permission to ride along to the shop. That was at a stage when the whole group of people was walking to the bakkie to leave. On Mr Kotoyi's own version he greeted S[...]`s uncle at the gate where the bakkie was parked and the other two gentlemen were standing at the back of the bakkie, greeting Ms S[...]`s uncle. On Mr Kotoyi's own version the area was well lit and there was illumination from the point where they left. It is highly improbable, to the extent that it is impossible, that the children asked permission and got onto the back of the bakkie without Mr Kotoyi knowing of their presence and seeing them on the back of the bakkie.

[61] With knowledge of the appellant and the other children on the back of the bakkie, Mr Kotoyi had a duty of care towards them in his driving of the bakkie. See **HT Madonsela obo LCM v Road Accident Fund** (48139/17 [2019] ZAGPPHC (8 August 2022)).

[62] In the present matter, where the appellant was a passenger, only 1% negligence on the side of the insured driver need to be proved by the appellant. In **Amanda Gumede v ROAD Accident Fund** (49209) [2017] ZAGPPHC 568 (24 August 2021) the following is stated in this regard:

[24] In so far as conduct is concerned, it is common cause that the insured driver was driving a motor vehicle wherein the minor was seated in the back of the motor vehicle with several other students. It is also common cause that the insured driver was trying to avoid a truck when his motor vehicle capsized and turned on its side. It is the defendant's case that the insured driver lost control of the vehicle and the vehicle overturned. I find in so far as the conduct is concerned, the probabilities favour the plaintiff.

...

[26] When it comes to the issue of fault all the plaintiff has to prove is a proverbial one percenter for the plaintiff to be successful. Counsel for the plaintiff referred me to *Groenewald v Road Accident Fund* where it was stated—

*'It is trite that the plaintiff, as a passenger claimant, need to prove only 1% negligence on the part of the insured driver in order to succeed with her claim against the defendant. .... The tendency on the part of the defendant in not conceding merits well in advance in matters where the plaintiff need only prove 1% is mind boggling, if it is not a deliberate stratagem to unnecessarily inflate litigation costs. Such conduct needs to be depreciated in the severest measures.'*

[63] In the present matter Mr Kotoyi, with the knowledge of the appellant and the other children on the back of the bakkie, drove too fast in the prevailing circumstances when exiting the town and dodging potholes. He may or may not have forgotten to drop off the children at the shop, because of the alcohol he consumed, or due to a different reason, which is not necessary to determine. The fact is that the appellant fell off the bakkie as a result of his negligent driving of the bakkie in the circumstances, which negligence caused the injuries which the appellant suffered.

[64] The appeal should consequently succeed.

**Order:**

[65] The following order is made:

1. The appeal succeeds, with costs.
2. The order of the court *a quo* is set aside and substituted with the following order:

“1. The defendant is held liable for 100% of the plaintiff’s agreed or proven damages.

2. The defendant is ordered to pay the costs of the action to date.”

**C. VAN ZYL, J**

I concur:

**N.S. DANISO, J**

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